(6)

Supreme Court, U.S.
FILED
AUG 20 2004
OFFICE OF THE CLERK

No. 03-1618

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF SACRAMENTO, INC.,
Petitioner,

v.

CALIFORNIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

---

PETITIONER'S REPLY MEMORANDUM

JAMES F. SWEENEY
ERIC GRANT

SWEENEY, DAVIDIAN,
GREENE & GRANT LLP
8001 Folsom Boulevard
Suite 101
Sacramento, CA 95826
(916) 388-5170

* Counsel of Record

KEVIN T. BAINE *
VICTORIA RADD ROLLINS
EMMET T. FLOOD
MICHAEL P. MORELAND

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

		Page
I.	CATHOLIC CHARITIES IS ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT.	2
II.	THE WCEA VIOLATES CATHOLIC CHARITIES' FREE EXERCISE AND FREE SPEECH RIGHTS.	5
III.	THIS CASE PRESENTS AN OPPORTUNITY TO CLARIFY *EMPLOYMENT DIVISION V. SMITH.*	7
CONCLUSION		10

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Boy Scouts of America v. Dale, 530 U.S. 640 (2000)	6, 10
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)	8
Employment Division v. Smith, 494 U.S. 872 (1990)	7-9
FCC v. League of Women Voters, 468 U.S. 364 (1984)	5
Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999)	8
Griswold v. Connecticut, 381 U.S. 479 (1965)	7
Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995)	6, 10
Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995)	6
Planned Parenthood v. Casey, 505 U.S. 833 (1992)	7
Roe v. Wade, 410 U.S. 113 (1973)	7
Roemer v. Maryland, 426 U.S. 736 (1976)	4
Rust v. Sullivan, 500 U.S. 173 (1991)	5
Tilton v. Richardson, 403 U.S. 672 (1971)	4
STATE CASES	
Kelly v. Methodist Hospital, 997 P.2d 1169 (Cal. 2000)	2, 3
McKeon v. Mercy Healthcare Sacramento, 965 P.2d 1189 (Cal. 1998)	2
FEDERAL STATUTE AND REGULATION	
26 U.S.C. § 6033(a)(2)(A)(i)	4
26 U.S.C. § 501(c)(3)	4
STATE STATUTES	
Cal. Corp. Code §§ 5110, 9110	3

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

Page

Laurence H. Tribe, Disentangling Symmetries: Speech, Association, Parenthood, 28 Pepp. L. Rev. 641 (2001) 10

IN THE

Supreme Court of the United States

No. 03-1618

CATHOLIC CHARITIES OF SACRAMENTO, INC.,
Petitioner,

v.

CALIFORNIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITIONER'S REPLY MEMORANDUM

The principal theme of California's Brief in Opposition is that Catholic Charities is in a predicament of its own choosing—that it chose to incorporate as a public benefit corporation, thereby undermining its claim to religious freedom, and that it chose to provide prescription drug coverage, thereby exposing itself to the State's contraceptive coverage mandate. But the State cannot so easily avoid responsibility for its own choice to disregard the rights that Catholic Charities unquestionably possesses in this case. There is nothing about Catholic Charities' choices here that forecloses its claim to the protection of the First Amendment, that diminishes the importance of the question presented in the Petition, or that affects the resolution of that question.

The most striking aspect of California's Brief in Opposition is its complete lack of response to the central question presented in the Petition—whether compelling Catholic Charities, an arm of the Catholic Church, to include contraceptives in its voluntary prescription drug plan amounts to compelled subsidization and endorsement of contraceptive use in violation of the free exercise and free speech provisions of the First Amendment. That is a question that warrants a response from the State and the attention of this Court.

I. CATHOLIC CHARITIES IS ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT.

The State of California concedes that Catholic Charities is not "wholly without free exercise protections." Respondents' Brief in Opposition ("Br. Opp.") 11. In the State's view, however, those rights are somehow diminished—or at least less worthy of this Court's attention—because Catholic Charities is incorporated as a "public benefit corporation" under California law and, as such, is eligible to receive state support for its charitable activities. As the Supreme Court of California has made clear, however, a "religious entity" with "religious" purposes may choose to incorporate either as a "nonprofit religious corporation" or as a "nonprofit public benefit corporation." *McKeon v. Mercy Healthcare Sacramento*, 965 P.2d 1189, 1192, 1194 n.2 (Cal. 1998) (hospital organized as a public benefit corporation eligible for exemption as a "religious entity" under state fair employment law); *see also Kelly v. Methodist Hospital*, 997 P.2d 1169 (Cal. 2000) (same). Catholic Charities has chosen to incorporate as a nonprofit public benefit corporation and to seek State funds to assist in the provision of its secular services. But those facts do not affect the merits or importance of this case, as the

State suggests. To the contrary, the State's suggestion itself raises important questions.

Does a church-related entity that provides secular services have to isolate itself entirely from the government, which shares an interest in the provision of those services, in order to maintain its religious identity? Must it choose to be *either* secular *or* religious? Or can it maintain a set of religious beliefs and simultaneously cooperate with the government in the provision of needed secular services—contracting with the government and receiving financial assistance from the government to provide those services?

The answer to these questions is important not only to organizations such as Catholic Charities, but also to the community at large. Providing for the social welfare of those in need in every corner of the land is an extraordinarily complex undertaking. It requires the cooperative efforts of countless institutions, public and private, religious and non-religious. Catholic Charities and institutions like it are important contributors to this overall effort. And it disserves not only those institutions, but also the millions they serve, to force such institutions to choose between maintaining their religious identities and providing needed secular services. *See Kelly v. Methodist Hospital*, 997 P.2d at 1178 ("Healthcare is a social service that historically has been associated with religious groups.").

In an attempt to minimize the importance of this case, California argues that it "[a]ffects [o]nly" nonprofit "public benefit corporations" under California law, not nonprofit "religious corporations." Br. Opp. 9; *see* Cal. Corp. Code §§ 5110, 9110. That argument, however, is wrong on two counts. First, neither the WCEA's exemption nor the California Supreme Court's opinion turns on an entity's status under California's Nonprofit Corporation Law. Entities that are incorporated as "religious corporations" are also covered by the State's contraceptive mandate, unless they meet the

four criteria for exemption under the WCEA—including the requirements that they exist to inculcate religious values, and that they serve and employ primarily those who share their religious tenets.[1] Catholic Charities would not qualify for the exemption even if it had chosen to incorporate as a nonprofit religious corporation. The distinction between "religious" and "public benefit" nonprofit corporations is thus a red herring in this case.[2]

Second, even if this case affected "only" public benefit corporations, its effect would be far-reaching. There are countless church-related universities, hospitals and other entities that fall into that category and that perform important educational and social services, in part with the support of public funds. Those institutions do not surrender their free exercise rights altogether by incorporating as nonprofit public benefit corporations under California law and maintaining their eligibility for State funds.

To be sure, a church-related institution that receives public funds subjects itself to restrictions on the use of those funds. *See, e.g., Roemer v. Maryland*, 426 U.S. 736 (1976); *Tilton v. Richardson*, 403 U.S. 672 (1971). But this case does not involve the expenditure of public funds. It involves the expenditure of private funds. There is simply no basis for California's suggestion that a church-related institution that accepts public support for its secular charitable activities can be forced to spend its own money in support of *unrelated* activities that violate its religious beliefs. *Cf. Rust v. Sullivan*,

---

[1] Notwithstanding its denial, Br. Opp. 16, California has unquestionably decided that entities that do not meet those criteria are not "sufficiently religious to exercise [their] religion freely."

[2] Whether Catholic Charities sought exemption from federal tax *filing* as a "church[]" or "integrated auxiliar[y]," 26 U.S.C. § 6033 (a)(2)(A)(i), is also irrelevant to the First Amendment issues in this case. It is exempt from the *payment* of taxes as an organization with "religious" and "charitable" purposes. 26 U.S.C. § 501(c)(3).

500 U.S. 173, 196-98 (1991) (provider of family planning services may be prohibited from spending federal funds on abortion-related activities, but is free to spend its own funds on those activities); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (government may not prohibit public broadcasting station that received federal funds from using private funds to editorialize). A church-related university does not waive its right to spend its own money on chapel services by accepting public money to build a science lab. Likewise, Catholic Charities does not waive its right to spend its own money in accordance with its religious beliefs by accepting public money to support secular welfare services.

II. THE WCEA VIOLATES CATHOLIC CHARITIES' FREE EXERCISE AND FREE SPEECH RIGHTS.

California offers no response to the petitioner's legal argument that it violates the First Amendment protections of free speech and free exercise to compel a church-owned organization to subsidize activities that violate the teachings of the sponsoring church. The State argues simply that as a factual matter Catholic Charities can avoid the coercion by dropping the prescription coverage it offers to its employees. But why should Catholic Charities be forced to deny a benefit to its employees in order to assert its religious beliefs—in particular, a benefit that the Church teaches it is required to provide? The fact is that Catholic Charities, having chosen to provide prescription drug benefits in accordance with its religious beliefs, has been compelled to subsidize contraception in violation of its religious beliefs. Whether that violates Catholic Charities' religious and expressive rights under the First Amendment is an important question on which this Court's guidance is needed.

In the Petition, Catholic Charities cited this Court's "expressive association" cases, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American*

Gay, Lesbian & Bisexual Group, 515 U.S. 557 (1995), in support of its argument that the First Amendment protects against compelled action that interferes with an organization's chosen message—even compelled action intended to advance the state's interest in eliminating discrimination. *See* Petition at 12-15, 19-20. California argues that Catholic Charities may not rely upon those cases, because it did not assert a separate right-of-association claim in the Supreme Court of California. Br. Opp. at 12-13. It is undisputed, however, that Catholic Charities asserted claims below that the WCEA violates not only its right of free exercise but also its right of free speech. App. 31a-35a. Nothing prevents Catholic Charities from citing the expressive association cases in support of that free speech claim. This Court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995), quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Catholic Charities' citation to this Court's expressive association cases is well within this traditional rule.

The expressive association cases provide a useful analogy to this case. They recognize the right of organizations to choose their message and to avoid forced *associations* that compromise their message. This case involves the right of a church organization to choose its message and to avoid forced *subsidization* that compromises that message. Catholic Charities did not assert a separate right-of-association claim, because the State has not, as in the *Boy Scouts* and *Hurley* cases, compelled an organization to associate with anyone it chose to exclude. The claim here is that the State has interfered with a religious organization's expressive rights in a different, even more offensive, way—by forcing the direct subsidization of conduct that it condemns.

To pay for contraceptives is to condone their use, and for any arm of the Catholic Church to condone the use of contraceptives is to contradict the Church's message that such use is wrong. It is difficult enough for a Church and its affiliated institutions to stand squarely behind such an unpopular and inconvenient religious message. The State of California has made it impossible for Catholic Charities to do so.

This case presents a question that is in some ways the flip side of the question that was posed in the Court's abortion and contraception cases. *E.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Those cases can be seen as standing for the proposition that those who believe abortion and contraception are morally wrong may not impose those beliefs upon those who disagree, because to do so invades a sphere in which those individuals enjoy implicit constitutional protection. This case presents the Court with an opportunity to clarify that the converse is true—that those who regard abortion and contraception as morally acceptable may not impose those beliefs upon a church organization that disagrees, because to do so invades a sphere in which the church enjoys explicit constitutional protection. The need for that clarification is apparent, given the prevalence of laws such as the one at issue here.

III. THIS CASE PRESENTS AN OPPORTUNITY TO CLARIFY *EMPLOYMENT DIVISION V. SMITH.*

California argues that there is no occasion to clarify whether the holding of *Employment Division v. Smith*, 494 U.S. 872 (1990), governs—or whether, instead, the compelling state interest test applies—because the Supreme Court of California held in the alternative that the compelling state interest test was satisfied. But petitioner has asked the Court to review that determination as well. As explained in the Petition, *how* strict scrutiny applies in a case like this is a

question no less important than *whether* it applies. *See* Petition at 21-23.

1. Whether strict scrutiny applies depends in part on what the Court meant in *Smith* by a law of "general applicability." Is this a law of general applicability because it applies to all providers of health insurance plans who choose to provide prescription drug coverage? Or is it something less than a law of general applicability, because it permits employers to deny prescription drug coverage altogether and allows some religious employers to exclude contraceptives from prescription plans that they choose to offer?

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), this Court held that ordinances prohibiting certain animal killings were not laws of general applicability, because they were substantially "underinclusive"—that is, because they failed to prohibit killings that endangered the asserted interests in public health and preventing cruelty to animals "in a similar or greater degree" than the prohibited killings. *Id.* at 543-44. The WCEA is far more underinclusive: it allows employers unilaterally to opt out altogether from the provision of prescription drug coverage. This aspect of the WCEA substantially undermines the State's asserted interests in providing contraceptive coverage and eliminating the disparity in the healthcare expenses of men and women. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (subjecting police policy against beards to heightened scrutiny because of medical exception undermining the asserted interest in fostering a uniform appearance).

In short, this is not a law of general applicability, because the State has identified no benefit so important that employers should generally be required to provide it. To that argument, the State has no response.

2. Whether strict scrutiny applies also depends on how the *Smith* Court's discussion of "hybrid" claims is interpreted and applied. There is a conflict among the Circuits, unaddressed by the State, on how to interpret that discussion. *See* Petition at 12 n. 4. And there is, as noted above, an important hybrid free-speech claim in this case.

3. The applicable level of scrutiny also depends on whether this case implicates considerations of church autonomy. California argues that such considerations are irrelevant because Catholic Charities is not a church or "religious corporation" under California law. Regardless of its status under California's Nonprofit Corporation Law, however, Catholic Charities is "ecclesiastically part of the Catholic Church," under the sole direction and authority of the Bishop of Sacramento. 13 Cal. App. A003743; 2 Cal. App. A000340, A000383. That the Bishop has chosen to carry out part of the Church's religious mission through a separate legal entity does not eliminate the considerations of church autonomy that this Court has recognized. How the Church structures and governs itself—and, in this case, how it defines its relationship to those who carry out its mission—are essential elements of Church autonomy. Whether the presence of these institutional considerations provides still another basis to distinguish *Smith*, which involved only an individual claim, is also an important question. *See* Petition at 17-19.

4. Finally, *how* strict scrutiny applies in a case like this one—which presents not a conflict between religious freedom and the public welfare, but instead a "clash of ideas," *see* Petition at 22-23—is an important question upon which the Court's guidance is needed. On one side of this dispute is the Church's idea—itself nondiscriminatory—that contraceptive use by men and women is wrong. On the other side is the State's idea that even this facially nondiscriminatory belief has a disproportionate impact upon women. The ultimate question in this case, as noted in the Petition, is whether the

State's interest in enforcing its idea of gender equity is more important than its obligation to respect the religious beliefs of the Church and the right of the Church's institutions to maintain their doctrinal integrity.

The California Supreme Court answered that question in the affirmative, reciting simply that there is a compelling state interest in "eliminating gender discrimination." App. 42a. As this Court emphasized in the *Boy Scouts* and *Hurley* cases, however, that is not an adequate answer when expressive rights are substantially infringed. *See* Petition at 19-20. It is even more obviously inadequate when applied, as here, to a policy that itself draws no distinctions on the basis of gender. Whether California can override Catholic Charities' free speech and free exercise rights in this case by attaching the "pejorative label" of discrimination[3] to the Church's gender-neutral teachings is an important question. It is important to Catholic Charities, to the numerous institutions that are affected by laws such as California's, and to the sensible development of the law in this difficult and oftentimes confusing area.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

---

[3] Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood,* 28 Pepp. L. Rev. 641, 651-52 (2001), *quoted in* Petition at 23 n.11.

Respectfully submitted,

JAMES F. SWEENEY
ERIC GRANT

SWEENEY, DAVIDIAN,
GREENE & GRANT LLP
8001 Folsom Boulevard
Suite 101
Sacramento, CA 95826
(916) 388-5170

* Counsel of Record

KEVIN T. BAINE *
VICTORIA RADD ROLLINS
EMMET T. FLOOD
MICHAEL P. MORELAND

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Petitioner